No. 20402

United States Court of Appeals for the Ninth Circuit

MONDAKOTA GAS COMPANY,
a corporation,

Appellant,

-vs-

COLLINS G. REED,

Appellee.

Brief of Appellee

DARYL E. ENGEBREGSON
JAMES J. PALMERSHEIM
Fratt Building
Billings, Montana
Attorneys for Appellant

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER
500 Electric Building
P. O. Box 2529
Billings, Montana
Attorneys for Appellee

Filed ....., 1966

....., Clerk

INDEX

INDEX OF AUTHORITIES

CASE AUTHORITY:

CASE AUTHORITY (Cont.):

OTHER AUTHORITY:

United States Court of Appeals
for the Ninth Circuit

MONDAKOTA GAS COMPANY,
a corporation,

Appellant,

-vs-

COLLINS G. REED,

Appellee.

Brief of Appellee

STATEMENT OF JURISDICTION

We agree the Court has federal jurisdiction. Appellant conceded the allegations and proof of fraudulent joinder of the Industrial Gas, Inc., a defunct Nevada corporation. As a result there is diversity of citizenship and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00 *(Par. IV-IX, Pet. for Rem., R. 2-7; Order denying remand, R. 114; Section 1332, Title 28, U.S.C.A.).*

STATEMENT OF CASE

Appellant's statement of case is not accurate nor sufficient. The United States Oil and Gas Lease described in appellant's complaint was issued as of September 13, 1935, to L. M. Walker, as lessee. L. M. Walker committed the working interest created by said lease to the Co-operative or Unit Plan of Development, Unit No. 5, Cedar Creek Anticline, by means of agreement dated May 26, 1934, by and between the said Walker and Gas Development Company, predecessor in title of original defendant Montana-Dakota Utilities Co. The working interest created by said lease in horizons below 2,000 feet was committed to the terms of an operating agreement dated May 24, 1934, by and between the said Walker and Fidelity Gas Co. In addition to the two agreements hereinabove described, the said Walker entered into gas purchase agreements with Montana-

Dakota Utilities Co. and its predecessor in title, Gas Development Company, dated respectively October 19, 1939, and May 26, 1934. Thereafter and on or about August 25, 1948, and after the above described agreements had been filed with the Bureau of Land Management of the United States Department of the Interior, the said L. M. Walker transferred and assigned all of her right, title and interest in and to said lease to appellant, Mondakota Gas Company, approved by the Bureau of Land Management December 23, 1948. *(See record and transcript, Docket Nos. 15293, 19638, 19639; Ans. this case, R. 116; Stipulation, R. 151-155; R. 135.)*

Appellant does not fairly nor accurately recite the chronology of the documentary evidence upon which the defendants, including the appellee, rely in this case. On motion for new trial, appellant asserts that the terms and provisions of, and claimed termination of, an alleged purchase agreement of June 17, 1952, raises in some mysterious and unexplained manner an issue of fact with respect to the validity of the subsequent assignment of December 5, 1952, upon which appellee relies. In the first place, as shown hereafter, copy of said purchase agreement which conveyed several pages of described lands and leases was never submitted to the District Court before summary judgment. In the second place, as shown by the allegations of the answer in the prior

adjudicated case, Civil 1557, discussed hereafter, the purchase agreement now offered on new trial was not the true agreement executed by the parties, but was falsified by the appellant before it was recorded, and it is a copy of the falsified, recorded agreement which is now asserted. In the third place, even if we were to assume that the agreement offered is the authentic agreement between the parties, and even if copy thereof had been submitted to the District Court before summary judgment, it could not have changed the result in this case. Appellee Reed does not rely on any conveyance to McElroy in the purchase agreement of June 17, 1952, as the source of his title. That purchase agreement has no connection with the appellee Reed. The appellee Reed is relying upon a later, new, and different agreement entirely entered into between appellant and McElroy on December 5, 1952, whereby for an entirely new and different consideration, the appellant assigned to McElroy the isolated federal oil and gas lease here involved, reserving certain overriding royalty rights in the appellant. It should be noted here that the decree in this case protects the appellant's reserved rights in that assignment. In other words, the title of the appellee Reed arises from a clean cut, unambiguous, unequivocal chain of title separate and distinct entirely from the purported purchase agreement of June 17, 1952, and having no connection

with it. Even if we were to assume some connection between the two agreements, the terms and provisions of the original purchase agreement merged into, and are superseded by, the subsequent assignment of December 5, 1952. Accordingly, the purchase agreement of June 17, 1952, even if it had been submitted to the District Court before summary judgment, could not have changed the result in this case.

On December 5, 1952, the appellant assigned interests in Federal Oil and Gas Lease 025001 to one E. L. McElroy, reserving some interest to the appellant *(R. 138)*. This was filed with the Bureau of Land Management on December 12, 1952, and *approved* by the Bureau of Land Management on March 23, 1953. On *May 28, 1953,* McElroy assigned to defendant in this case, L. B. Buchtel, filed with the Bureau of Land Management on August 21, 1953, and *approved* by the Bureau of Land Management *(R. 141)*. *October 28, 1954,* Buchtel assigned to appellee Collins G. Reed, filed with the Bureau of Land Management on November 1, 1954, and *approved* by the Bureau of Land Management on December 1, 1954 *(R. 143)*. These instruments were all set forth in the answer filed in the case *(R. 116);* they are plain, unambiguous, unequivocal; certified copies thereof were submitted to the court at the pretrial conference *(R. 223)*; copies were again attached to the mo-

tion for summary judgment *(R. 135-143),* and their authenticity and validity were conceded by appellant. From the time the pretrial conference was held until summary judgment they were never challenged *(Dist. Court Order, R. 223-224.)* There was no documentary or other evidence before the Court attacking or questioning or disputing their validity. On the strength of the undisputed, uncontradicted, and admitted evidence before the District Court at the time the summary judgment was decided, the judgment which issued was the only decision which could be reached. The Court was very careful in its decree in this case to reserve to the appellant all interests which the appellant had reserved in the base federal oil and gas lease assignment to McElroy of December 5, 1952 *(see page 3, Judgment, R. 162).* The subsequent assignments from McElroy to Buchtel and from Buchtel to Reed do not involve, nor adversely affect, the interest reserved by the appellant and protected by the decree.

The complaint in this case *(R. 9-12)* attempts to quiet title in the appellant to Federal Oil and Gas Lease No. 025001. On *February 2, 1953,* appellant joined with other plaintiffs in the action known as the Cedar Creek case, and in the third cause of action and fourth cause of action attempted to quiet title in the appellant to the same federal oil and gas lease, 025001. Named as defendants in that Cedar Creek Case were Fidelity Gas

Co., Montana-Dakota Utilities Co., and Shell Oil Co., all named as defendants along with Buchtel and Collins G. Reed in the present complaint. McElroy was not named as a defendant in the Cedar Creek Case, nor were Buchtel nor Reed. The third cause of action and the fourth cause of action in the Cedar Creek Case were identical with the complaint in this case, in which judgment in favor of Fidelity Gas Co., Montana-Dakota Utilities Co., and Shell Oil Co., and against the appellant was rendered, and was affirmed by this Ninth Circuit Court in *249 F.2d 277, Docket No. 15293, certiorari denied, 78 S. Ct. 775.* The third cause of action and fourth cause of action in the Cedar Creek Case can be found at pages 23 to 26 of the transcript in Docket No. 15293. On the day the Cedar Creek trial commenced, counsel representing the plaintiffs advised the Court they desired, and moved, to dismiss causes of action Nos. 3 and 4. The record shows that the Court responded "very well" *(T, P. 231, Docket 15293).* At no place, however, in the subsequent proceedings was there any request by the appellant Mondakota Gas Company to be relieved as a party plaintiff, or dismissed from the Cedar Creek action as a party, nor was there ever any order to that effect. It is significant, because from the time that the appellant joined in the Cedar Creek complaint which was filed on or

about *February 2, 1953,* until the case came on for trial on April 13, 1955 *(T, P. 219, Docket 15293)*, the appellant actively participated as a party plaintiff in all of the preparation for the trial in that case. Not only was the appellant in the Cedar Creek case purporting to quiet title to base lease 025001, but the defendants Fidelity Gas Company, Montana-Dakota Utilities Company and Shell Oil Company (all defendants in the complaint in this case) were vigorously asserting the subsisting validity of all documents before the Court in that case. For that reason, it is important that no order was ever asked for, or given, in the Cedar Creek Case, dismissing the appellant as a party plaintiff. Exactly the same situation pertains as it does in any case where a party plaintiff appears at the trial, puts in no evidence, the defendant puts in evidence, and judgment is then rendered for the defendant. As far as the record in the Cedar Creek Case is concerned, the appellant was still a party to the action when the findings of fact, conclusions of law, and judgment were signed, filed and entered *(Docket No. 15293, T, Pp. 182-199; Pp. 199-201; Pp. 204-205).* The judgment entered and noted in the civil docket in the Cedar Creek Case on *July 3, 1956,* was just as effective against the appellant Mondakota Gas Company as it was against any other plaintiffs in the Cedar Creek Case.

In any event, if not barred by the judgment itself,

the dismissal as to appellant in the Cedar Creek Case was an adjudication on the merits against appellant under *Rule 41(b), Federal Rules of Civil Procedure,* and is now res adjudicata.

No later than *July 25, 1961,* the appellant filed his complaint in this case, Civil No. 354, against Fidelity Gas Company, Montana-Dakota Utilities Company, Shell Oil Company (all defendants in the Cedar Creek Case), L. B. Buchtel and appellee Reed to quiet title in appellant to the same federal oil and gas lease 025001 that was involved in the Cedar Creek Case. Two companion cases, S-W Company v. Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company, and The First National Bank of Denver, Colorado, v. Fidelity Gas Company, Montana-Dakota Utilities Company and Shell Oil Company, Civil Nos. 355 and 356, respectively, were consolidated for trial. Summary judgment against the appellant in all three cases was docketed on *August 31, 1964,* more than three years later. Judgment in the two companion cases against the appellant has been affirmed by this Court *(D.C. Mont., 1965, 244 F. Supp. 327; ..... F. 2d ....., Docket Nos. 19638, 19639).*

The chronology of this action from the time the complaint was filed until the summary judgment was entered more than three years later is of interest. The Court

will quickly note that at all times the appellant was offered by the District Court a full, fair and complete opportunity to present to the District Court all of its claims of every kind and character, and to submit to the District Court any and all evidence which the appellant might offer or assert in support of its position. As indicated above, as of the time the summary judgment was entered, all the documentary evidence before the Court was admitted, conceded, and undisputed. There was no issue of fact as of that time.

July 25, 1961, was the date summons was issued in the State Court, so that the complaint was filed no later than that date *(R. 8).* On *August 1, 1963,* answer was filed. Appellee Collins G. Reed attached photostatic copies of each and all of the documents upon which he relied *(R. 116). August 12, 1963,* order issued calling a pretrial conference for September 16 *(R. 124). August 21, 1963,* the parties stipulated to trade for examination all documents upon which the parties relied *(R. 125).* On *September 6, 1963,* filed September 16, 1963, the appellant by letter to the appellee outlined the documents upon which the appellant might rely. We specifically call to the attention of the Court that in that letter in September, counsel for the appellant indicated that he might rely upon the purchase agreement between McElroy and appellant of June 17, 1952, and complaint

at least in Civil No. 1157, Federal District Court, appellant v. McElroy *(R. 129-130)*. No copy of the agreement was ever submitted to the District Court. Except for the description of the Federal Civil Action No. 1557 contained in an affidavit filed in this case March 21, 1964, describing the dismissal of that action for lack of diligent prosecution *(Vol. 1, P. 173, Transcript, Docket No. 19639)*, the purchase agreement of June 17, 1952, of questionable authenticity, was never again mentioned in the case after the letter of September 6, 1963, in any of the proceedings prior to the date the summary judgment was entered in *August, 1964*. On *September 16, 1963,* a pretrial conference was held. Counsel for the appellant was fully and carefully interrogated concerning the issues, contentions, and proof relied upon. Documents relied upon were submitted to the District Court. No issue of assignment invalidity was suggested. The pretrial order issued *October 22, 1963*. There was no suggestion of any attack on the validity of the base assignment of December 5, 1952, from appellant to McElroy, or the subsequent assignments from McElroy to Buchtel to appellee. On *November 1, 1963,* separate motions for summary judgment were filed by the respective defendants *(R. 131)*. The motion of the appellee Collins G. Reed expressly recognized the prior rights which this appellant had reserved in the assignment of December 5,

1952, which appellant made to E. L. McElroy. Once again, the appellee Reed outlined the documents relied upon by the appellee *(R. 131)*. Copies of assignments were attached -- Walker to appellant *(R. 135)*; appellant to McElroy *(R. 138);* McElroy to Buchtel *(R. 141);* Buchtel to appellee *(R. 143)*. Appellant said in part:

> "The separate motions for summary judgment of defendants, Fidelity Gas Company and Montana-Dakota Utilities Company, are made on the ground that there is no genuine issue as to any material fact with respect to the respective rights and interests of the plaintiffs and these defendants. These motions are made and based upon numerous listed instruments designed, we believe, to establish the rights of the defendants in and under the Fidelity Operating Agreements, certain gas purchase agreements, certain unit agreements for the development of the upper horizon for gas purposes, and the establishment of certain royalty interests in these defendants. Plaintiffs concede that they claim no interest under the gas unit agreements, the gas purchase contracts covering the upper horizon, and that plaintiffs do not dispute the overriding royalty interests involved. As a matter of fact, if all of the former interests of Fidelity and MDU under the Fidelity Operating Agreements, affecting the oil and gas rights below a depth of 2,000 feet were acquired by Shell Oil Company by virtue of its operating agreement with Fidelity and MDU, then it would appear that the issues in these cases are between the plaintiffs and Shell Oil Company. These issues are outlined in plaintiffs' memorandum in support of its motion to amend and modify the pretrial orders, which is filed herewith. As indicated in that memorandum these issues appear to be (1) whether the judgment

> in the Cedar Creek case is res judicata of the rights of the plaintiffs and (2) the rights of the plaintiffs to have the defendants' rights under the Fidelity Operating Agreement terminated by reason of the abandonment of their obligations under Fidelity Agreements because of their failure to comply with the provisions of these agreements. These issues are discussed both in plaintiffs' memorandum in support of their motion to have the trial order modified and in plaintiffs' pretrial memorandum. We feel that it is not necessary to repeat here such contentions and arguments. The Court is respectfully referred to such memorandum and to plaintiffs' pretrial memorandum."

No argument was presented to the district judge suggesting an issue of fact with respect to the assignments. Filed *November 8, 1963,* was a stipulation of October 28, 1963, between the parties in which they submitted to the Court the documents designated therein, waived any foundation, agreed that they could be received in evidence and considered by the Court. It should be noted that the purported purchase agreement of June 17, 1952, now urged in the motion for new trial, was not submitted by the appellant *(R. 151).* On *December 12, 1963,* the appellant filed a motion to modify the pretrial order. In that motion there was no issue raised concerning the validity of the assignment of December 5, 1952, nor suggesting any issue of fact by reason of the purchase agreement of June 17, 1952, nor questioning the validity of the assignments from McElroy to Buchtel to Reed. On *March 21, 1964,* affidavit was filed in

support of motion for security for costs which pointed up the prior aborted attack by appellant against McElroy in United States District Court Civil No. 1557 *(Vol. 1, P. 173, Transcript Docket No. 19639). April 8, 1964,* an order set all motions for hearing at 2:00 P.M. on April 27, 1964 *(R. 155).* Briefs were filed by the appellant in support of his motion to modify the pretrial order, and opposing the motions for summary judgment. It is significant that at no time in any of those briefs did the appellant assert any reliance upon the purchase agreement of June 17, 1952, nor question the validity of the subsequent assignments from McElroy to Buchtel and from Buchtel to Reed. As a matter of fact, the position taken by the appellant as of that date is described in the order of District Judge W. D. Murray denying the motion for new trial as follows:

> "This attempt to question the validity of the assignment from the plaintiff to McElroy is made in this case for the first time on the motion for a new trial. The validity of the assignment to McElroy was not mentioned as an issue in either the pretrial order filed October 23, 1963, or the plaintiff's motion to modify the pretrial order which was filed December 12, 1963. As a matter of fact, at a pretrial conference, plaintiff's then counsel conceded that the title of all of the defendants in this and the two companion cases was settled by the decision of this court in Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., which was affirmed by the Court of Appeals in 249 F. 2d 277. At that pretrial conference the attorney for the plaintiff

> stated that plaintiff in this and the two companion cases was relying on breaches of the Fidelity operating agreements which were alleged to have occurred subsequent to the final judgment in the Cedar Creek Oil and Gas case. The attack on the validity of the assignment of the Walker lease by the plaintiff to McElroy for the first time on the motion for a new trial appears to be an afterthought and that reason alone would warrant the denial of the motion for a new trial." *(R. 223-224)*

August 3, 1964, order granting the motions for summary judgment was issued. *August 13, 1964*, notice of form of the proposed judgment was served on the appellant and filed . Note that no objection was ever made or filed by the appellant, and nothing was indicated by appellant that he was relying on invalidity of the base assignment or subsequent assignments *(R. 157)*. *August 20, 1964*, notice of amended form of judgment was served, and again there was never any objection filed by the appellant to the form of judgment, or suggesting or indicating any reliance on the gas purchase agreement of questionable authenticity of June 17, 1952 *(R. 158-159)*. *August 31, 1964*, judgment in the form served was signed, filed and entered, granting to this appellant all rights which this appellant had reserved in its prior assignment of December 5, 1952, to McElroy. The subsequent assignments from McElroy to Buchtel and Buchtel to Reed could not, and do not affect or disturb those prior rights of the appellant fully protected as indicated *(R. 160-164)*.

The foregoing chronology illustrates clearly that during the more than three years between the time the complaint was filed in this case on *July 25, 1961,* and the date when the summary judgment was entered on *August 31, 1964,* the appellant at all times had a full, fair and complete opportunity to present to the District Court any and all claims the appellant might have of every kind and character, and to present to the District Court any and all evidence upon which it relied. It is clear from the foregoing chronology that if the appellant at the start of the case could legally claim or was claiming invalidity of the assignment of December 5, 1962, by reason of the alleged termination of the purchase agreement of June 17, 1952, adjudicated against the appellant in both the Yellowstone District Court action, and the Federal District Court Civil No. 1557, he abandoned any such claims, and never at any time thereafter asserted or relied upon them. Instead he admitted and conceded to the District Court the validity of all documents before the Court and said he was relying instead on alleged defaults in performance under the base federal oil and gas lease subsequent to the date of the Cedar Creek judgment entered July 3, 1956. Upon the admission by the appellant that it had never served on any of the defendants any written notice of default, or any other claim of default, the District Court properly granted summary

judgment to all defendants *(244 F. Supp. 327, later affirmed by this Court, ... F. 2d .....; Docket Nos. 19638 and 19639).*

A. *Motion For* ~~*Summary Judgment.*~~ NEW TRIAL

On *September 9, 1964,* through new and different counsel, appellant attacked the summary judgment claiming an issue of fact with respect to the validity of the assignment of December 5, 1952, from appellant to McElroy *(R. 165)* by reason of the alleged termination of the purchase agreement of June 17, 1952, between appellant and McElroy. In view of the chronology in this case outlined above, and the additional chronology discussed hereafter, the suggestion in the motion for new trial that appellant was presenting new evidence which he could not have discovered and presented with reasonable diligence is fantastic and incredible. Keeping in mind as outlined above, appellant suggested in a letter of September 6, 1963, he might rely in this case on a purchase agreement of June 17, 1952, between appellant and McElroy, and on the complaint at least in Civil No. 1157, appellant never thereafter before summary judgment submitted copy of any such agreement to the Court for consideration, nor indicated he was relying upon it. It was never offered or submitted at the pretrial conference; never mentioned in the pretrial order, nor the motion to modify the pretrial order, nor the memo-

randum submitted therewith; nor in the briefs or proceedings for summary judgment. In truth and in fact, of course, the one has no bearing or effect upon the other.

On *August 18, 1953,* eight years before complaint was filed in this case, appellant filed a complaint in Cause No. 27622 in Yellowstone County, Montana, against the same E. L. McElroy, one E. A. Markey and others *(R. 71-77).* On *November 4, 1953,* appellant filed the same form complaint against the same McElroy, and the same Markey in Civil No. 1557 in the Federal District Court *(R. 13-19).* Each complaint attached as an exhibit the purchase agreement of June 17, 1952, alleged breaches of its terms by McElroy, alleged on information and belief assignments of interests to co-defendants, prayed for a decree cancelling the purchase agreement, and transfers to the co-defendants. *Note:* The assignment of December 5, 1952, from appellant to McElroy, clean cut and unambiguous in its terms, and the subsequent assignment from McElroy to Buchtel, preceded the commencement of those two cases attacking the validity of the purchase agreement of June 17, 1952. Likewise, their filing and approval by the Bureau of Land Management preceded the start of these two cases. Neither complaint referred to, nor attacked the validity of the assignment of December 5, 1952. The purchase agreement of June 17, 1952, has no

connection with the subsequent assignment of December 5, 1952, so that even if it had been presented to the District Judge in this case before summary judgment, it could not have affected the result. Furthermore, the Yellowstone County action was dismissed on *December 16, 1963*, for failure of appellant to prosecute *(R. 113)*, a judgment against appellant on the merits as far as his right to cancel or terminate the purchase agreement was concerned *(Rule 41(b), M.R.C.P.)*. The Court should notice the allegations of the answer filed in this Federal District Court case No. 1557 *(R. 58-62)* which specifically denied the validity and authenticity of the gas purchase agreement of June 17, 1952, and its amendments; which alleged that after the agreements were executed, the appellant had altered those agreements before recording them by substituting pages of land description. On *February 18, 1959,* the Montana Federal District Court ordered the appellant plaintiff to either file a motion within thirty days for leave to file an amended complaint, or to dismiss as to all defendants except McElroy, or any person substituted for McElroy *(R. 63)*. On *March 17, 1959,* the appellant filed a praecipe *(R. 64)* as a result of which on *March 23, 1959,* there was an order dismissing as to all defendants except McElroy *(R. 65)*. When as of *October 11, 1961,* no motion had ever been made by the appellant for the

substitution of a successor or representative of deceased McElroy, the District Court entered an order dismissing because of failure to diligently prosecute the case *(R. 66)*. This is an adjudication against the appellant on the merits under *Rule 41(b), F.R.C.P.,* including the denial of the authenticity of the agreement and its falsification before recording.

On *March 9, 1954,* John Wight filed an affidavit with the Bureau of Land Management of the United States claiming defaults in the terms of the purported gas purchase agreement of June 17, 1952 *(see Exhibit B-10, R. 4)*. The record does not disclose whether that administrative remedy was exhausted. The same claims of course, were involved in the Yellowstone County State District Court action, and in Federal Civil No. 1557, both of which are described above.

The claim of newly discovered evidence of which he was unaware, and unable to present with diligence is indeed fantastic.

This complaint was filed *July 25, 1961.* Pretrial conference was held *September 16, 1963.* Motion for summary judgment was filed *November 1, 1963.* Order granting issued *August 3, 1964,* and judgment was entered *August 20, 1964.* Mailed *June 3, 1965,* by still newer and different counsel was a second motion to amend the motion for new trial by incorporating the

record of a 1965 default judgment against Industrial Gas, Inc. What possible connection could it have with this case? Neither McElroy, Buchtel, nor Reed were defendants. Industrial Gas, Inc., was fraudulently joined as a defendant in this case *(Pet. to Rem., R. 2-7)*. Appellant on hearing of motion to remand so conceded *(Order Deny. Remand, R. 114-115)*. What possible application does the default judgment in a state court in late 1965 against Industrial Gas, Inc., have with this case? There was never any connection between McElroy, Buchtel, and appellee Reed on the one hand, and Industrial Gas, Inc., on the other.

Not only is Wight's claim of "newly discovered evidence of which plaintiff was ignorant at the time of trial herein, and which he could not have sooner discovered in the exercise of diligence" fantastic and incredible, it could not have any bearing on the merits, as shown above, and it was so speculative and conjectural substance-wise, that no district court court could accept it. From 1953 during which appellant filed three separate cases to *August 31, 1964*, date of judgment, appellant was involved in litigation concerning this very lease. Appellant waited until *September 9, 1964*, through new and different counsel, to change the position he had taken before judgment in the District Court, and to request what would constitute harassing discovery, on the ground of

"newly discovered evidence of which plaintiff was ignorant at the time of trial herein and which he could not have discovered in the exercise of due diligence." Hearsay affidavit of Robert Kelleher, Esq., and hearsay, self-serving, affidavit of John Wight, filed September 9, 1964, in support of the motion for new trial, suggest that Wight, alleged president of the appellant, had previously learned from a reliable source that Buchtel was the brother-in-law of deceased McElroy; that on September 5, 1964, *by means of a telephone call,* he learned that appellee was a brother-in-law of said E. A. Markey; that Markey was alleged to be a one-time partner of McElroy *(Paragraph III of the 1953 Yellowstone County complaint so alleges, R. 73)*; that Markey was a brother-in-law of appellee Reed; that

> "Affiant further *suspected but had no proof* that there was no consideration for the assignment from Buchtel to Reed" *(Emphasis supplied; R. 173)*;

that *"affiant believed"* that Reed *"may have had"* an economic interest in the partnership of Markey and McElroy; *that affiant believed* that if the court would grant leave to take depositions of Buchtel, Markey, and Reed, that *then* sufficient evidence *could be obtained* to prove that there was no consideration for the assignments from McElroy to Buchtel to Reed. It was further claimed that appellant was prepared to submit evidence of lack of consideration of the base assignment of December 5,

1952, but *was prevented from doing so* because a motion for summary judgment was filed, heard, and granted *(R. 168)*.

At the time set for the hearing on the motion for new trial, *March 16, 1965,* a motion for continuance and discovery through income tax returns was presented by still newer and different counsel, wholly unsupported. Mailed *April 21, 1965,* was a motion to amend the motion for new trial. Mailed *June 3, 1965,* was a second motion to amend the motion for new trial incorporating the record of a state court default judgment against defunct Industrial Gas, Inc., the corporation originally fraudulently joined as a defendant in this case. Appellee Reed was not a party to that action. Appellant conceded in this very case Industrial Gas, Inc., was fraudulently joined *(Pet. Rem., R. 2-7; Order Deny. Remand, R. 114-115)*. The chain of title in this case was not involved. It has no competence or relevance.

It was not until *September 9, 1964,* that appellant contended through new and different counsel on motion for new trial, as pointed out in the order denying the new trial, that:

> "This attempt to question the validity of the assignment from plaintiff to McElroy is made in this case for the first time on motion for new trial * * *. The attack on the validity of the assignment of the Walker lease by plaintiff to McElroy for the first time on the motion for a new trial appears to

be an afterthought and that reason alone would warrant denial of the motion for new trial." *(R. 223)*

The District Court also felt the dismissal for lack of prosecution of Cause No. 1557 commenced in 1953 in Federal District Court, in which appellant sought cancellation of the June 17, 1962, agreement from appellant to McElroy, was an adjudication against appellant on the merits under Rule 41(b); that since the decree protects appellant's rights reserved in the base assignment of December 5, 1952, the subsequent assignments from McElroy to Buchtel to Reed are of no concern to appellant; and that the discovery requested, as well as the newly discovered evidence, pertain to the issue of the validity of the subsequent assignments, and would not assist appellant. *(R. 224)*

This chronology of events demonstrates conclusively why the appellant has never had any basis in fact or law to invoke the discretion of the District Court to grant a new trial in the first instance. Appellant wholly failed to prove any of the essentials for either granting a new trial, or for permitting the requested harassing, discovery witch-hunt. Furthermore, appellant's request that this Court find abuse by the District Court in its discretionary action is totally unsupported in fact and law.

ARGUMENT

When a motion for summary judgment is made, it is

incumbent upon the adverse party to immediately come forth with specific facts showing that there is a genuine issue for trial. No such showing was made prior to judgment in this case by the appellant. The failure of the adverse party to so respond requires that summary judgment shall be entered against him. Appellant as of the date of summary judgment conceded the validity of all documents then before the Court, and was relying upon claimed defaults in operation subsequent to the date of the Cedar Creek judgment, already adjudged against appellant and affirmed *(D.C. Mont. 1965, 244 F. Supp. 327, ...F. 2d ....., 9th C.C., Docket Nos. 19638, 19639).*

(Rule 56 (e), F.R.C.P.);

(First National Bank v. First Bank Stock Co., 1962, 9th C.C., 306 F. 2d 937.)

In this connection, this Court has said:

> "Counsel for appellant then states because this is an important case, he should be excused for his failure to file opposition to the motion to dismiss, and for summary judgment * * *
>
> "The court below properly, in the exercise of its judicial discretion, granted the motions before it. There was no opposition, either in writing or orally to the facts presented by appellees. Counsel for litigants, no matter how 'important' their cases are, cannot themselves decide when they wish to appear, or when they will file those papers required in a law suit. Chaos would result. 'Attorneys should make an attempt to conform to the rules and not try to improvise new practice.' (Citing case.) There must be some obedience to the rules of court; and some

respect shown to the convenience and rights of other counsel, litigants, and the court itself.

"Finding no error, we do not reach a consideration of the merits of appellant's claim. We find no abuse of discretion in the trial court's refusal to reopen."

(Smith v. Stone, 1962, 9th C.C., 308 F.2d 15 at 18.)

As pointed out by the District Court, appellant conceded the validity of the base agreement prior to the date the summary judgment was entered. The District Court was, of course, thoroughly familiar with each and every detail of the proceedings taken in that court. In this connection, this Court has said:

"Even in the absence of specific record support we would be inclined to rely upon a district court's interpretation of a stipulation arrived at during pretrial proceedings and approved by the court."

(Likins-Foster Monterey Corporation v. United States, 1962, 9th C.C., 308 F. 2d 595 at 599.)

In several decisions, this Court has spelled out the general rules which preclude relief for the appellant in this case:

a. "Litigants are required to be reasonably alert at trial in the protection of their own interests. If this record could be said to show reasonably genuine surprise on the part of appellants, the remedy would have been to ask for a continuance to allow appellants to 'gather their wits' and prepare for the presentation of rebuttal testimony. (Citing case.) Having failed to do this, and having permitted the cause to go to judgment, it is too late to seek an opening

up of the issues, no proper grounds appearing. (Citing case.)

"Even where it is asserted that the additional evidence asked to be received is newly discovered, the movant must show that he failed to discover that evidence earlier although he exercised due diligence. (Citing cases.) And where, as here, the evidence is not newly discovered, the movant must show that it was for some reason beyond his reach at time of trial. (Citing case.) In the instant case, the named new witnesses, being employees or close acquaintances of appellants, were at all times readily available.

"Another consideration indulged in passing on a motion for new trial is whether the grounds offered suggest a substantial chance of reaching a different result in a new trial. (Citing case.) The proffered testimony is circumstantial and it is doubtful that it would have influenced the court to the extent of rendering a different judgment.

"Important elements of this case are strikingly similar to those of a case which appellants have cited, which states well the general rules:

" 'There is nothing to indicate that any of the parties whose testimony the garnishee now seeks to present to the court were at the time of the trial in any wise incapable of appearing or beyond the reach of the garnishee. Indeed, the parties from whom additional evidence would be elicited are persons who are and have been readily available to the garnishee.' Rue v. Feuz Const. Co., D.C. 1952, 103 F. Supp. 499, 502."

(Moylan v. Siciliano, 1961, 9th C.C., 292 F. 2d 704 at 705-706.)

b. "Appellants' motion for a new trial upon the ground of newly discovered evidence was denied by the district court for lack of diligence. The motion is directed to the sound discretion of the trial

court and is not ordinarily reviewable except where that discretion has been abused. We do not find such abuse here. Over seven months had elapsed between the filing of the action and the date of trial, and another four months elapsed prior to judgment, without the production of new evidence. Indeed, new evidence was not offered until after new counsel had been substituted by appellants at a time when, as the district court pointed out, appellants had already had their day in court."

(Pacific Contact Laboratories, Inc. v. Solex Laboratories, Inc., 1954, 9th C.C., 209 F.2d 529 at 533, cert. den. 75 S. Ct. 26.)

c. "It is also well settled that motions for new trial are addressed to the sound discretion of the court, and orders denying them are not reviewable on appeal in the absence of clear abuse of discretion. (Citing cases.) Allegedly newly discovered evidence which would not materially change the result and which is in large part not newly discovered at all is not ground for a new trial. (Citing cases.)

" 'Newly discovered evidence' within Civil Procedure Rule 59, 28 U.S.C.A. following section 723c, refers to evidence of facts existing at time of trial, of which aggrieved party was excusably ignorant. (Citing cases.) * * * The application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto. 39 Am. Jur. §161, p. 168."

(United States v. Bransen, 1944, 9th C.C., 142 F.2d 232 at 235.)

We have read all statutes and cases cited in the brief of appellant. We have no quarrel with their abstract statements of law. None of them, however, have considered or applied facts such as appear in this case, nor

would they have differed from the rulings of the District Judge if they had. One case from appellant's brief summarizes the reasons why the District Judge was compelled to rule as he did in this case.

> "To grant a new trial for 'newly discovered evidence,' the new evidence must be something which was unknown at or before the trial, must have been something which could not have been discovered by reasonable diligence and must be something which in its nature would indicate that a new trial would be more favorable to the movant, and must be material and not merely cumulative."
>
> *(U.S. v. 72-71 Acres of Land, 23 F.R.C. 635, affirmed, Webb v, U.S., 1960, 4th C.C., 273 F.2d 416.)*
>
> *(App. Br., Pp. 10-11.)*

In this case, all the evidence suggested in the request for new trial was known for years before trial; it was in the possession of appellant; it does not suggest or indicate that a new trial would change the old result; and it is for the most part not competent or material.

Appellant states that in *Elliot & Sons v. King & Co., 1957, D.C., N.H., 22 F.R.D. 280,* "* * * it was said that the District Court *should* order discovery under Rule 27 even though there is an appeal pending" *(emphasis supplied) (App. Br., P. 11).* The opinion says no such thing. The opinion states: "Rule 27(b) is discretionary with the court." Whether that discretion should be exercised, of course, depends on the facts of

each case. It certainly was not warranted in this case on the showing made.

All other cases cited by appellant are equally inconclusive. It would unduly extend this brief to discuss them. Suffice it to say, they do not warrant a different result in this case.

Nothing has ever been presented to the District Judge, nor to this Court, indicating in what way the purchase agreement of June 17, 1952, if valid, affects this case; nor in what way its termination would affect this case; nor in what way its termination would affect the validity of the clean cut, unambiguous assignment of December 5, 1952; nor in what way constructive notice of its contents has any bearing; nor why it was never asserted to the District Judge at pretrial conference or any subsequent stage of the case before the summary judgment issued. In any event the dismissal for lack of prosecution by the State District Court of the 1953 action against McElroy and Markey is an adjudication on the merits that no grounds existed for terminating the questionable purchase agreement of June 17, 1952. In *Rule 41(b), Montana Rules of Civil Procedure* it is provided:

> "* * * Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for lack of an indispensable party, operates as an adjudication on the merits." (It is the same as *(41(b), F.R.C.P.)*

Likewise, the dismissal of Civil No. 1557 by the Montana United States District Court of the 1953 action against McElroy and Markey has the same effect. It was in this case the answer denied the authenticity of the document, and alleged specifically the falsification and alteration by appellant of the purchase agreement prior to recording. The falsified agreement is the one now before the court. The dismissal with prejudice is res judicata on this issue. *(Rule 41(b), F.R.C.P.)*

It is a fundamental rule that a judgment on the merits is conclusive as to all matters which might have been litigated under the issues raised by the pleadings, and as to any other issues actually litigated, although outside of those raised by the pleadings; that the facts pleaded as well as the law applicable pass under the rule of things adjudicated, and the party against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectively as though such facts were found from the proof or admitted ore tenus in the course of the trial.

50 C.J.S. at page 168; at page 206;

Sherlock v. Greaves, 1938, 106 Mont. 206 at 214, 76 P.2d 87 at 90;

Missoula Light & Water Company v. Hughes, 1928, 106 Mont. 355 at 366, 77 P.2d 1041;

Kleinschmidt v. Binzel, 1894. 14 Mont. 31 at 52-53, 35 Pac. 460;

Libin v. Huffin, 1950, 124 Mont. 361 at 363, 224 P.2d 144;

Dern v. Tanner, 9th C.C., Mont., 1938, 96 F. 2d 401 at 404-405; cert. den. 59 S. Ct. 82.

As indicated by the District Court, the validity or invalidity of the subsequent assignments from McElroy to Buchtel to appellee Reed has no relevance or bearing whatsoever upon appellant's prior rights. The prior rights reserved to appellant in the assignment of December 5, 1952, are protected in the decree. Plaintiff in a quiet title action must rely upon the strength of his own title, and not on the weakness, if any, of his opposition.

Hinton v. Staunton, 1951, 124 Mont. 534, 228 P.2d 461.

In Montana, a party is estopped by the terms and provisions of a deed under which he claims title, and upon which he relies for title. He is never estopped by such a deed when he claims under a separate or different title which is paramount. In this case, the title of appellee Reed has never arisen out of nor stemmed from the purchase agreement of June 17, 1952, even if it were authentic or competent. The title of appellee Reed stems from the later, newer and different agreement, the assignment of December 5, 1952. Even if the

purchase agreement had been the true agreement between the parties instead of a falsly recorded document, and even if it had been submitted to the District Court, and even if appellant had not conceded to the District Court the validity of the assignment of December 5, 1952, the purchase agreement could not have changed the result in this case.

Hart v. A.C.M., 1924, 69 Mont. 354, 222 Pac. 419.

In any event, the terms and provisions of the purchase agreement would have become merged in, erased by, and supplanted by the terms and provisions of the later clean cut, unambiguous provisions of the assignment of December 5, 1952, approved by the Bureau of Land Management.

Humble v. St. John, 1925, 72 Mont. 519 234 Pac. 475.

CONCLUSION

The degree spells out and protects whatever rights appellant retained by the reservations in the base assignment of December 5, 1952, from appellant to McElroy. There never was any basis for appellant to question the validity of that agreement. If there ever was an issue of fact with respect to the validity of the assignment of December 5, 1952, the appellant was compelled to disclose it to the District Court before summary judgment, instead of accepting and conceding its validity as was

done in this case. The motion for new trial invoked the sound discretion of the District Court, and the order of denial is not reviewable save for a clearly demonstrated abuse of discretion. It is apparent the District Court found appellant's assertion of newly discovered evidence which appellant failed to discover or pursue or present, and could not do so in the exercise of due diligence, fantastic and incredible in face of the chronological history outlined above. The change in position after summary judgment, the submission to the court after summary judgment of a falsified document which obviously could have been submitted before, and the fact that the document even if it had been submitted could not have changed the result, did not warrant the grant of a new trial by the District Judge in the first place. Appellant's request to this Court to find abuse of discretion by the District Court is equally incredible in light of the foregoing record. The fact background of this case as outlined above, in light of the authorities outlined above, certainly does not warrant a reversal by this court of the discretion vested in, and exercised by, the District Judge.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER

By CALE CROWLEY
Attorneys for Appellee
Collins G. Reed

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

CALE CROWLEY
One of the Attorneys for the
Appellee Collins G. Reed